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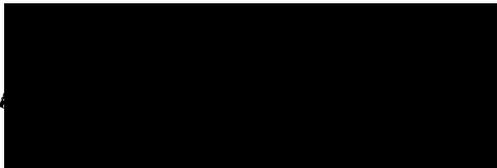


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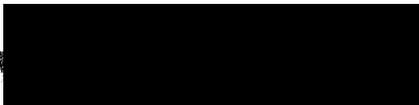
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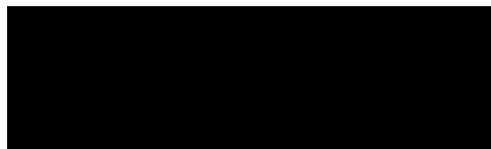
FILE: LIN 02 214 55131 Office: NEBRASKA SERVICE CENTER Date:

IN RE: Petitioner:  
Beneficiary:



PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The Director, Nebraska Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to change the beneficiary's classification as an L-1B nonimmigrant intracompany transferee with specialized knowledge to an L-1A intracompany transferee pursuant to § 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized in the State of Delaware that designs, manufactures, markets, and services compressors. The petitioner claims that it is the parent of the beneficiary's foreign employer, located in South Africa. The petitioner now seeks to employ the beneficiary as a rotary engineer II for three years.

The director denied the petition concluding that the petitioner failed to demonstrate that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. The director noted that according to the description of the beneficiary's responsibilities, the beneficiary would spend approximately 83% of his time performing operations related to engineering, rather than primarily performing managerial duties.

On appeal, counsel claims that the beneficiary's proposed position satisfies the requirements of managerial capacity because: (1) the beneficiary manages the function of the petitioner's rotary profile technology programs; (2) the beneficiary manages and controls engineering personnel; (3) the beneficiary has the authority to hire and fire subordinate employees and initiate other personnel actions; and (4) the beneficiary exercises discretion over the daily operations of a function of the business, as the beneficiary is solely responsible for the design and development of the rotary screw compressor components. Counsel submits a brief in support of the appeal.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L). Specifically, within three years preceding the beneficiary's application for admission into the United States, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education,

training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The issue is whether the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

- (i) Manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) Supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) Exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

- (i) Directs the management of the organization or a major component or function of the organization;
- (ii) Establishes the goals and policies of the organization, component, or function;
- (iii) Exercises wide latitude in discretionary decision-making; and
- (iv) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner filed the nonimmigrant petition on June 19, 2002. In an accompanying letter, dated June 17, 2002, the petitioner outlined the beneficiary's proposed job duties as:

- 1) Manage our extremely proprietary Rotor Profile Technology Programs;
- 2) Design and develop high quality, reliable, and competitive products particularly where prior practice may not provide direction;
- 3) Maintain professional technical competence in the fields of engineering sciences;
- 4) Motivate and supervise technical staff to achieve project goals;
- 5) Communicates with peer groups in other departments to resolve problems and to meet objectives;
- 6) Support marketing, sales, and service personnel in technical fields resolving unstructured product problems;
- 7) Analyze and correct product problems; request GDI technical positions at customer/distribution meetings;
- 8) Responsible for the engineering design and development of key components related to our rotary screw compressor products;
- 9) Manage a group of Engineering personnel on various design projects.

The petitioner submitted an organizational chart of its engineering staff, which identified the beneficiary in the organization's third staffing level, subordinate to the petitioner's director of engineering and manager of engineering rotary products. The staffing level below the beneficiary included the following six employees: product document specialist; product engineering coordinator I; product designer; machine designer; two drafters.

In a request for evidence, dated August 29, 2002, the director requested that the petitioner further explain the tasks involved with each of the beneficiary's above-outlined job duties, and asked that the petitioner supplement the beneficiary's job description with an allocation of the amount of time the beneficiary would spend on each task. The director also noted that the petitioner's organizational chart identified that the beneficiary has one direct subordinate. The director asked that the petitioner explain the subordinate's job duties and provide a verification of his or her drafting degree.

Counsel responded in a letter dated November 13, 2002 and provided the following time allocation for the beneficiary's job duties:

Manage our extremely proprietary Rotor Profile Technology Programs (20%)

Design and develop high quality, reliable, and competitive products particularly where prior practice may not provide direction (20%)

Responsible for the engineering design and development of key components related to our rotary screw compressor products (20%)

Maintain professional technical competence in the fields of engineering sciences (12%)

Manage a group of Engineering personnel on various design projects (10%)

Analyze and correct product problems; request IMD technical positions at customer/distribution meetings (9%)

Motivate and supervise technical staff to achieve project goals (5%)

Communicates with peer groups in other departments to resolve problems and to meet objectives (2%)

Support marketing, sales, and service personnel in technical fields resolving unstructured product problems (2%)

Counsel also explained that with regard to managing the rotor profiled technology programs, the beneficiary would be responsible for:

Development of software to generate the rotor profiles. Generation of the inlet and discharge porting required by the rotors. Development of software to analyze the profiles, i.e. sealing line length, blow hole sizes, cell volume curve. Use dedicated software to compute the thermodynamic behavior of the gas during the compression process. Generation of the rotor profile clearance distribution. This includes the testing of rotors to establish their wear characteristics. Keeping track of the advances and characteristics of competitor's profiles. Calculation of the reaction loads on the rotors due to the gas pressure; and the resultant load on the bearings. Determination of which rolling element bearings are required to carry the loaded rotors for an acceptable life expectancy.

In an accompanying letter from the petitioner to counsel, dated October 14, 2002, the petitioner explained that with regard to the support personnel subordinate to the beneficiary, the beneficiary along with five other engineers share the "pool" of six subordinate employees. The petitioner clarifies in the letter "that there is not a one-on-one relationship" between the beneficiary and any of the six subordinates. The petitioner provided comprehensive job descriptions for each of the support positions. As the descriptions are part of the record, they will not be repeated herein.

In a decision dated January 27, 2003, the director determined that the petitioner did not demonstrate that the beneficiary would be employed by the United States entity in a qualifying capacity. The director outlined the job duties to be performed by the beneficiary and concluded that the beneficiary would spend approximately 83% of his time performing the operations of the engineering department. The director noted that the remaining 17% of the beneficiary's time would be dedicated to managerial duties, such as supervising the technical staff, communicating with peer groups and managing engineers. The director concluded that the beneficiary would be primarily performing the functions of an engineer, rather than those of a manager or an executive. Accordingly, the director denied the petition.

In an appeal filed on March 3, 2003, counsel states that the director erred in concluding that the beneficiary does not qualify as a manager. Counsel outlines section 101(a)(44)(A) of the Act, and claims the following:

[The beneficiary] manages the function of the Rotary Profile Technology Programs at [the petitioning organization]. As the employer letter suggested, 20% of [the beneficiary's] time would be involved in the managerial capacity of the rotor profile technology programs. . . . Due to [the beneficiary's] extensive training and expertise in this field, he is one of the major resources for the analytical design of the rotor profiling and modeling programs for [the petitioning organization]. [The beneficiary] is highly involved in the design to continue launching a cutting edge high efficiency line of rotary compressors over the next two years.

Secondly, [the beneficiary] meets the second prong of the INA 101 (a)(44)(A) and the 8 C.F.R. 214.2(l)(1)(ii)(A) standard. He supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization. [The beneficiary] controls and manages a group of Engineering personnel on various design projects while working in his capacity as Rotary Engineer II position as was listed in the job duties. . . .

[The beneficiary] also meets the third prong of the INA 101(a)(44)(A) and the 8 C.F.R. 214.2(l)(1)(ii)(A) standard. [The beneficiary] has authority to recommend the hiring and firing of personnel those [sic] as well as other personnel actions of the employees he directly supervises. [The beneficiary] supervises 5 employees as the organizational chart (Exhibit B) supports this contention as do the statement of job duties that were included in the original packet and the Request for Additional Evidence. (Please see Exhibit B)

Lastly, [the beneficiary] meets the fourth requirement of the INA 101 (a)(44)(A) and the 8 C.F.R. 214.2(l)(1)(ii)(A) standard. [The beneficiary] exercises discretion over the day-to-day operations of the function for which he has authority. [The beneficiary] is solely responsible for the engineering design and development of the key components related to the rotary screw compressor products. He also manages the Rotor profile technology programs within [the petitioning organization]. He also initiates the design and development of high quality, reliable and competitive products that keeps [the petitioner] on the forefront of technology in the field of rotary compressors.

On review, the petitioner has not established that the beneficiary would be employed in the United States in a qualifying capacity. The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). As required in the regulations, the petitioner must submit a detailed description of the executive or managerial services to be performed by the beneficiary. *Id.* While the petitioner submitted a detailed job description for the beneficiary, the accompanying time allocation demonstrates that the beneficiary would dedicate the majority of his time to performing daily

functions of the engineering department. As outlined by the petitioner, the beneficiary would spend approximately 61% of his time on the following non-qualifying tasks: (1) designing and developing products; (2) maintaining professional technical competence; (3) analyzing and correcting product deficiencies; and (4) designing and developing key components of the petitioner's rotary screw compressor products. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

An additional 20% of the beneficiary's time would be spent managing the rotor profile technology programs. Although the petitioner indicates that the beneficiary would "manage" these programs, the petitioner's explanation of this task implies that the beneficiary would instead be personally developing the technology programs. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. at 604.

Here, the petitioner indicates that the beneficiary's specific responsibilities related to this task include developing software to analyze and generate rotor profiles, testing rotors, and tracking competitor's profiles. The remaining responsibilities also involve actually working on the programs. The petitioner's description fails to substantiate its claim that the beneficiary is actually "managing" the programs. While the petitioner claims that the beneficiary "has access to [the] pool of subordinates," the petitioner does not state whether any of the six employees would perform the functions of the rotor profile technology programs. It is therefore reasonable to assume from the petitioner's job description that the beneficiary would not be "managing the rotor profile technology programs," but rather, performing the functions involved in developing the programs. Consequently, the beneficiary would dedicate a cumulative 81% of his time to non-managerial and non-executive job duties. Clearly, the beneficiary would not be employed in a primarily managerial or executive capacity.

Moreover, although counsel claims on appeal that the beneficiary supervises five subordinate employees, the job descriptions related to these positions do not substantiate this claim. Each of the job descriptions submitted states that the specific employee would be required to report to the product engineer manager or the senior technician. Despite what is portrayed on the petitioner's organizational chart, it would therefore seem that the lower-level employees would report to the beneficiary's manager, the "manager [of] engineering rotary products," rather than directly to the beneficiary. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Furthermore, it does not appear from the record that any of the lower-level employees are professional, managerial, or supervisory employees. Although the beneficiary is not required to supervise personnel, if it is

claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act.

In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by the subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner has not established that an advanced degree is actually necessary, for example, to perform the work of a product document specialist, product engineering coordinator, product designer, machine designer, or drafter. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional. 8 C.F.R. § 214.2(I)(1)(ii)(B)(4).

Based on the foregoing discussion, the petitioner has failed to demonstrate that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. For this reason, the appeal will be dismissed.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the director's decision will be affirmed and the petition will be denied.

**ORDER:** The appeal is dismissed.